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U.S. Citizenship and Immigration Services

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[redacted]

FILE: LIN 04 243 52421 Office: NEBRASKA SERVICE CENTER Date: AUG 10 2005

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a medical diagnostic laboratory. It seeks to employ the beneficiary permanently in the United States as a chief medical technologist pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, the petition was accompanied by certification from the Department of Labor. Upon reviewing the petition, the director determined that the minimum level of education stated on the labor certification does not conform to the standards of the classification sought. The director also found that the beneficiary did not satisfy the minimum level of education stated on the labor certification, because the beneficiary does not hold a "United States baccalaureate degree or a foreign equivalent degree" and therefore cannot possess the equivalent of an advanced degree.

On appeal, counsel asserts that the director erroneously adjudicated the petition under the wrong classification, and that the beneficiary holds the equivalent of a bachelor's degree.

First, we shall address the issue of the classification sought.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). Regarding the "equivalent" of an advanced degree, the regulations state: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The record contains an approved Department of Labor Form ETA-750, Application for Alien Labor Certification (labor certification). Regarding the minimum level of education and experience required for the proffered position, Part A of the labor certification indicates that the position requires at least four years of college, culminating in a "Bachelor of Science (or equiv)" in "Biology, Med Tech or Microbiology (or equivalent)." The position also requires three years of experience in the job offered or in the related occupation of "Clinical Microbiology."

The director denied the petition, stating that the position requires neither an advanced degree nor at least five years of progressive post-baccalaureate experience. On appeal, counsel does not contest this finding. Instead, counsel argues that the director should have considered the petition under section 203(b)(3) of the Act, pertaining to professional workers (EB-3), instead of under section 203(b)(2), pertaining to professional workers holding an advanced degree. Counsel states:

> Please be informed that the immigrant petition [at] issue was filed with a cover letter. . . . Unfortunately, it appears . . . [that] my letter explaining the category under which this case is filed is Third Preference, EB-3 . . . [was] not considered. The petition was accidentally evaluated under EB-2 Advanced Degreed Professionals. . . . However, a review of the petition, my cover letter, and the supporting labor certification, and all other documents submitted, reveals that the case was filed under INA § 203(b)(3).

The "other documents" shed no light on the classification sought. The information contained in the labor certification itself is not *prima facie* evidence of the classification sought. It is the petitioner's duty to specify the classification sought; it is not the director's obligation to examine the documentation submitted, and infer the classification most likely to result in approval of the petition.

The only documents that explicitly mention the classification sought are the I-140 petition form itself and counsel's accompanying cover letter. The cover letter does, indeed, refer to the classification sought as "EB-3 Professional." The Form I-140, however, is far from unambiguous in this regard. On that form, Part 2, "Petition Type," includes nine check boxes, and the instruction "check one." Box (d) is labeled "A member of the professions holding an advanced degree or an alien of exceptional ability." Box (e) is labeled "A professional . . . or a skilled worker."

Part 9 of the Form I-140 indicates that counsel prepared the petition form. The form was filled out by computer, rather than by hand. Examination of the Form I-140 shows that, originally, counsel printed an "X" in box (e). Subsequently, however, that "X" was obscured with white correction fluid, and a new "X" was handwritten in box (d). On appeal, counsel submits a photocopy of the Form I-140. This photocopy shows the same handwritten "X" in box (d), and box (e) is partially obscured by white space that exactly matches the dried correction fluid on the original form. This proves that the Form I-140 was changed before it ever left counsel's office, rather than at the Service Center. When this change is considered in conjunction with the cover letter, it was reasonable for the director to conclude that the petitioner initially sought to classify the beneficiary under EB-3 (hence the cover letter and the original marking in box (e) of the Form I-140), but then changed the classification sought to EB-2 (hence the handwritten alteration of the Form I-140). The marks on the Form I-140 have every appearance of a deliberate change (as opposed to stray marks or spilled ink), and the director was therefore justified in concluding that these marks were intentional, and that the purpose for these marks was to change the classification sought.

We conclude, based on the above, that the director did not err by adjudicating the petition under the EB-2 classification instead of EB-3. If the petitioner desires consideration under section 203(b)(3) of the Act, then the proper course of action is to file a new petition with the same labor certification; the labor certification remains valid, and any petition approved with that labor certification would have the same 2002 priority date.

That being said, the remaining ground for denial concerns the beneficiary's eligibility for the job offer as set forth in the labor certification. This issue is completely independent from the issue of the classification sought; if the beneficiary does not meet the minimum requirements stated on the labor certification, then no petition can be approved on the basis of that labor certification, regardless of the classification sought.

Item 11 of Form ETA 750B, Statement of Qualifications of Alien, shows the following educational background for the beneficiary:

School, College, or University	From	To	Degrees or Certificates Received
Central Institute of Technology	3/1987	11/1989	Cert. Medical Science
New Zealand Med. Lab. Technologies	2/1990	11/1990	Diploma in Med. Tech.
South Seattle Community College	9/1998	5/2000	Pre-nursing credits

The beneficiary did not receive a bachelor's degree; rather, she earned several shorter-term certificates in related, but distinct, fields.

In a letter submitted with the initial petition, Claudia R. Steen, program director at Central Washington University, states "it is the opinion of this evaluator that [the beneficiary] has the equivalent of a Bachelor's degree in Medical Technology from an accredited college or university in the United States."

The director, in denying the petition, stated:

> The term "United States baccalaureate degree or a foreign equivalent degree" is interpreted by the Service to mean a United States Bachelor's degree or a *single-source*, foreign degree that is equivalent to a U.S. baccalaureate degree. . . . A baccalaureate degree is generally found to require four years of education. *See Matter of Shah*, 17 I&N Dec. 244, 245 ([Reg.] Comm. 1977). Unlike nonimmigrant petitions for temporary workers, employment-based immigrant petitions cannot make allowances to accept a series of certificates granted by different institutions for formal and/or informal study along with work experience when determining a beneficiary's educational qualifications. In this case, neither the diploma nor the certificate alone is the equivalent of a United States baccalaureate degree, and they may not be combined together along with work experience to meet the regulatory requirements.

On appeal, the petitioner submits a new evaluation of the beneficiary's academic credentials. Counsel describes the evaluator, [redacted] as "a qualified expert with special expertise in the education system in New Zealand." Ms. [redacted] states: "the New Zealand Certificate in Science (Medical Science) and the Diploma in Medical Laboratory Technology . . . is the equivalent in level and purpose to the Bachelor of Science in Medical Laboratory Technology." This evaluation confirms the director's finding that the beneficiary possesses no "foreign equivalent degree," i.e., a single degree from one institution that is equivalent to a bachelor's degree from an accredited U.S. college or university. Ms [redacted] explains that the standard educational trajectory of a medical technician in New Zealand does not include a four-year degree; but this explanation does not exempt nationals of New Zealand from the definition of "bachelor's degree" set forth in *Matter of Shah*.

Claudia Steen, writing now as program director for the Yakima Regional Clinical Laboratory Science Program, states that "there is a severe and growing shortage of qualified . . . clinical laboratory scientists." Be that as it may, this assertion is entirely irrelevant to the question of whether the beneficiary holds the bachelor's degree that the labor certification requires.

Dr. [redacted] of the University of Washington states that an applicant with the beneficiary's educational credentials "would be admissible to our Master's program in Laboratory Medicine." The petitioner cannot arbitrarily disregard the standard set forth in *Matter of Shah*, and replace it with a more favorable standard. We are under no obligation to adopt or share Dr. [redacted] evaluation of the beneficiary's credentials. The question here is not whether the beneficiary could be admitted to a University of Washington graduate program, but whether she holds a bachelor's degree or a foreign equivalent degree (as opposed to the equivalent *of a* degree). CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony, but CIS is not obliged to accept such statements. *See Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

The petitioner submits an excerpt from a document headed "AILA-BCIS Nebraska Service Center Liaison Conference Call / August 13, 2003." This excerpt contains the following statement: "Our current policy for EB-2 and EB-3 cases is that where the labor certification requires a U.S. bachelor's degree, we accept a U.S. bachelor's degree or a single foreign degree that is the equivalent of a U.S. bachelor's degree." Considering that this excerpt fully agrees with the director's reasoning in denying the petition, it is not clear how this document supposedly

supports the contrary argument. In this instance, the beneficiary does not hold "a single foreign degree that is the equivalent of a U.S. bachelor's degree."

The petitioner submits a copy of a letter dated January 7, 2003, from Mr. [redacted] Director of the Business and Trade Services Branch of CIS's Office of Adjudications (Office of Adjudications letter). This letter discusses whether a "foreign equivalent degree" must be in the form of a single degree or whether the beneficiary may satisfy the requirement with multiple degrees.

The Office of Adjudications letter was written in response to a letter from an attorney who inquired whether, for purposes of 8 C.F.R. § 204.5(k)(2), a "foreign equivalent degree" is limited to a "foreign degree" or whether "foreign education" may count, "when no formal degree is conferred or a 3 year foreign degree combined with a diploma that is determined to be equivalent to a United States degree." In response, Mr. [redacted] stated:

> You ask whether the reference to "a foreign equivalent degree" in 8 C.F.R. 204.5(k)(2) means that the *foreign equivalent advanced degree* must be in the form of a single degree. Despite the use of the singular "degree," it is not the intent of the regulations that only a single foreign degree may satisfy the equivalency requirement. Provided that the proper credential evaluations service finds that the foreign degree or degrees are the equivalent of the required US degree, then the requirement may be met.

(Emphasis added.) Considering the new credentials evaluation and the Office of Adjudications letter, counsel asserts that the beneficiary has a "foreign equivalent degree" to a United States baccalaureate degree.

Counsel's assertions are not persuasive. First, the petitioner has submitted nothing that would overcome the holding in *Matter of Shah* that a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree because a United States baccalaureate degree is generally found to require four years of education.

Also, the letter from the Office of Adjudications is not persuasive. The succinct response of Mr. [redacted] specifically refers to "the foreign equivalent advanced degree" as the point of concern, rather than the phrase "United States baccalaureate degree or a foreign equivalent degree." Accordingly, the response appears to specifically address the phrase "foreign equivalent degree" as it relates to the definition of advanced degree at 8 C.F.R. § 204.5(k)(2): "'Advanced degree' means any United States academic or professional degree or a foreign equivalent degree above the baccalaureate level." Mr. [redacted] response is reasonable when considered in the context of a "foreign equivalent degree" to a United States advanced degree; by definition, an advanced degree is a degree above the baccalaureate level, thereby requiring multiple degrees.

However, if applied to the phrase "United States baccalaureate degree or a foreign equivalent degree" contained at 8 C.F.R. § 204.5(k)(2), the letter's reasoning would lead to results directly contrary to the regulations, statute, and the intent of Congress. In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . .

> indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (November 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act with anything less than a full baccalaureate degree, or that would allow a combination of lesser certificates to constitute an "equivalent degree" when a labor certification specifically calls for a bachelor's degree. Although the preamble to the publication of the final rule specifically dismissed the option of equating "experience alone" to the required bachelor's degree, the same reasoning applies to accepting an equivalence in the form of multiple lesser degrees, professional training, incomplete education without the award of a formal degree, or any other level of education deemed to be less than the "foreign equivalent degree" to a United States baccalaureate degree. Whether the equivalency of a bachelor's degree is based on work experience alone or on a combination of multiple lesser degrees, the analysis results in the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree." In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree. As noted in the federal register, persons who claim to qualify for an immigrant visa by virtue of education or experience equating to bachelor's degree will qualify for a visa pursuant to section 203(b)(3)(A)(i) of the Act as a skilled worker with more than two years of training and experience. In addition, a combination of degrees which, when taken together, equals the same amount of coursework required for a U.S. baccalaureate degree does not meet the regulatory requirement of a foreign equivalent degree.

Furthermore, the Office of Adjudications letter is not binding on the AAO. Letters written by the Office of Adjudications do not constitute official CIS policy and will not be considered as such in the adjudication of petitions or applications. Although the letter may be useful as an aid in interpreting the law, such letters are not binding on any CIS officer as they merely indicate the writer's analysis of an issue. *See* Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, *Significance of Letters Drafted by the Office of Adjudications* (December 7, 2000) (copy incorporated into the record of proceeding).

Because the beneficiary does not have a United States baccalaureate degree or a foreign equivalent degree, the beneficiary does not meet the minimum educational requirement stated on the labor certification. If the petitioner arbitrarily chooses some other standard for what is "equivalent" to a bachelor's degree, then the petitioner must specify that standard on the labor certification. Otherwise, the default presumption is that the "equivalent" conforms to CIS' accepted and well-established standards. The petitioner cannot argue after the fact that, by "equivalent," the petitioner meant a three-year certificate in Medical Science followed by a one-year diploma in Medical Technology.

For the above stated reasons, considered both in sum and as separate grounds for denial, the petition may not be approved. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.